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April 24, 1995

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Request for Expedited Clarification
PP Docket 93-253

Dear Mr. Caton:

David Mixer, a potential limited partner in GO Communications Investors, L.P. ("GCI"), a limited partnership that intends to be a member of the control group of GO Communications Corp. ("GO"), hereby requests that the Commission clarify its rules concerning ownership requirements for designated entities' control groups. Based on a meeting with Commission staff on April 13, 1995, we believe that the staff is considering establishing by interpretation a new requirement that the 15% of the control-group equity that must be held by qualifying investors must all be controlling equity held by individuals -- that is, all 15% must be voting stock or general partnership interests in the bidder, and it cannot be held by entities such as limited partnerships. We believe that this interpretation is at odds with the letter and spirit of the rules and the practice of designated entities that have relied in good faith on the plain language of the rules in preparing to participate in the Block C/F auctions. This new interpretation could render the majority of designated entities ineligible and make the task of raising capital to participate in the auctions even more difficult.

Because of the potential resolution of the stay, Block C bidders must finalize their structures immediately. We believe the Commission should promptly and clearly resolve two issues of critical importance to designated entities:

(1) The Commission should make clear that the 15% of the bidder's equity that must be held by qualifying entities can be held in the form of nonvoting stock or limited partnership interests.

(2) The Commission also should make clear, however, that entities holding nonvoting stock or limited

partnership interests must qualify to be in the control group -- that is, they must be minorities, women or small businesses, as appropriate, and they must satisfy the Commission's size standards taking into account all direct affiliations.

If these issues are not resolved, investors that will be vitally important to designated entities may be unable to participate in funding these entities, and the bidders in which they would have invested will be weakened. They may not be able to replace these investors at this late date. These unfair and undesirable results can be avoided by appropriate resolution of these two issues, without compromising the policy goals about which the Commission is properly concerned.

GO intends to qualify as a small business under the Commission's Rules. It intends to utilize a 75/25% structure, with 10% of its control-group equity held by an institutional investor. The remaining 15% of GO's equity will be held by management, by a corporation holding voting stock, and by GCI and another limited partnership. It is the portion of GO's equity that will be held by GCI that occasions this request.

GCI is an independent, qualifying small business that is wholly owned by an individual general partner and by individual limited partners, whose identities and partnership shares change as the general partner seeks to raise money and as timing and other considerations affect its ability to raise capital and interest investors. The board seat represented by GCI's equity will be filled by GCI's general partner, and the limited partners will be fully insulated from any ability to control either GO or GCI.[1/] Each limited partner in his or her own right, and including his or her own directly affiliated business interests, qualifies under the $40 million small business cap. In the aggregate, taking into account all the assets, revenues and direct affiliations of all members of GO's 15% group, GO qualifies as a "small business." GCI's limited partners have agreed to play a passive role in the control group. However, they also have committed to provide long-term support for GO by agreeing to be locked into the stringent five-year illiquidity status required of all members of the 15% portion of the control group.

[1/] The general partner is an individual who does not have common investments, or other business relationships with, the individual limited partners. The general partner also has made a significant economic investment in the limited partnership that it controls.

GO's structure is not unique. We have closely followed designated entity investment issues and yet we were surprised to learn of the staff's apparent change of position on these issues. We believe that other prospective bidders have established limited partnership structures that would not qualify under the interpretations raised with us by the Commission's staff last Wednesday. These bidders either will discover those new interpretations and scramble to restructure by the time it is necessary to submit a short-form application or they will file in their present state and have to restructure if they win the bidding (assuming that these structures are not seen later by the staff as disqualifying). Such an outcome would result in like-situated applicants being treated differently depending on whether they had discovered the Commission's new interpretations early enough to act on them. Even those who won at auction and then had to restructure would be subject to the risk that they could not, in their restructured status, sustain their original bid. We submit, therefore, that prompt clarification is called for.

I.

The Commission has a valid interest in ensuring that the benefits of its designated entity rules "accrue to the intended beneficiaries."[2/] This goal is met by requiring that all parties holding interests in the 15% portion of the control group be "qualifying" -- that these parties be minorities, women or small businesses. But requiring further that the 15% portion of the control group be comprised entirely of controlling equity held only by individuals is unnecessary to meet the Commission's policy goals and counterproductive. Under the staff's interpretation, a bidder with a group of minority individuals holding equity directly would be acceptable but another bidder with the same individuals holding the same level of ownership through the widely accepted vehicle of a limited partnership would be disqualified. This result would be irrational.

This interpretation is not grounded in the language of the Commission's Rules. A "control group" is defined as "an entity, or a group of individuals or entities" that controls an applicant. 47 C.F.R. § 24.720(k) (1994) (emphasis added). The same definition recognizes that these "entities" may be "corporations" or "other types of businesses." Id., §§

[2/] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report & Order, 9 F.C.C. Rcd. 5532, ¶ 112 (1994) ("Fifth Report").

24.720(k)(2), 24.720(k)(3), 24.720(k)(4). The rules' recognition that limited partnerships should be eligible to hold control-group equity is important to designated entities' ability to attract equity investment; limited partnership interests offer investors insulation from liability for management decisions, an important consideration for venture capital investors. Passages in the decision adopting this rule which spoke of requiring interests in the 15% portion of the control group to be held by "qualifying, controlling principals in the control group" do not compel a contrary result.[3/] In the case of GCI, all the equity is held by an entity that exercises control (through its general partner) over 100% of the equity it holds.[4/] Because the Commission's rules permit "entities" to hold control group equity and contemplate "corporations" and "other types of businesses" holding such interests -- and because designated entities have relied on this language in good faith in establishing and funding their companies -- it would be unfair to read the language out of the rule to reach a contrary result.

Neither is there a basis in the Commission's rules or policies for finding that the control-group equity held by a qualifying limited partnership (or a corporation with non-voting shares) cannot be counted fully toward the 15% requirement. If a limited partnership owns and controls, for example, 6% of an applicant's equity, and has all rights that appropriately flow from ownership of that equity (including the right to appoint a number of directors commensurate with

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[3/] Implementation of Section 309(j) of the Communications Act of 1934, Fifth Memorandum Opinion & Order, 10 F.C.C. Rcd. 403, ¶ 64 (1994) ("Fifth Memorandum"). The ex parte presentation cited in connection with that passage does not suggest that entities should not be eligible to hold control-group equity. See Ex Parte Presentation of Media Communications Partners, PP Docket 93-252 (Oct. 11, 1994).

[4/] The rules recognize that a "qualifying investor" in the control group can be an entity. Section 24.720(n)(1) defines a "qualifying investor" as "a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group" who satisfies the size standards. If an entity could not hold control-group equity, there would be no need for the Commission to explicitly state that a qualifying investor can be one who "holds an interest in" a member of the control group. Moreover, this very definition refers back to the definition for small business, a section that refers exclusively to "entities." 24 C.F.R. § 24.720(b) (1994).

its equity ownership), there is no rational basis for refusing to count all of that limited partnership's equity toward the 15% requirement. In a properly structured limited partnership, all of the control-group equity held by the limited partnership is controlled by the general partner. See 24 C.F.R. § 204(d)(2)(viii) (1994) (an ownership interest in a PCS licensee shall be treated "as if it were a 100 percent interest" if that interest "represents actual control"). Any other result would be contrary to general principles of contract law. A finding that the only portion of a limited partnership's ownership that can be counted toward the 15% portion of the control group is that represented by the actual direct equity held by the limited partnership's general partner has no basis in the language or logic of the rules.

II.

Limited partnerships thus should be permitted to hold interests in the 15% portion of the control group. The question of how to ensure that non-qualifying investors do not obtain benefits intended only for designated entities, however, remains. Under one problematic interpretation of the rules, the Commission would not look at all to whether a limited partner indirectly holding control-group equity is "qualified" as a minority, woman or small business because the rules define "nonattributable equity" as, inter alia, "limited partnership interests that do not afford the power to exercise control of the entity." 24 C.F.R. § 24.720(j)(1)(ii) (1994). Under this view, the assets and revenues of the limited partners would not be counted. This view is consistent with Small Business Administration precedent; if a limited partner is properly insulated from controlling the applicant, the SBA would not look to its revenues and assets at all.[5/]

We do not believe that this view is sufficiently stringent for the Commission's purposes. We believe that the Commission should clarify that all direct and indirect owners of interests in the 15% portion of the control group must demonstrate that they are "qualifying investors," taking into account all direct affiliations. Under this view, a limited partner in an applicant qualifying as a small business would be a "qualifying investor" only if the investor and all entities the investor itself directly controls meet the small-

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[5/] See, e.g., Size Appeal of Ochoco Lumber Co., SBA No. 3812, 1993 SBA LEXIS 89; Size Appeal of Holk Development, Inc., SBA No. 3138, 1989 SBA LEXIS 108; Size Appeal of Squires Associates, SBA No. 2963, 1988 SBA LEXIS 77.

business size standard. 24 C.F.R. § 24.720(b)(1) (1994). Further, the applicant would qualify to bid as a "small business" only if it and all its control-group investors -- including its limited partners and their direct affiliates -- meet the small-business size standard in the aggregate. This interpretation would prevent the abuses that could result from simply holding that limited partnership interests are "nonattributable" and thus not subject to scrutiny.

This result harmonizes the policy goals of the Commission with principles of general contract law, under which limited partners appropriately are subject to a lesser degree of scrutiny than general partners by virtue of limited partners' inability to control the partnership. By "direct affiliates," we mean those entities that are actually controlled by the limited partner. For example, if an investor owns a controlling interest in a large computer software company, the assets and revenues of that company would be counted against the investor and, if they exceed the caps, disqualify that investor. The "identity of interest" subset of the Commission's affiliation rules, however, is unnecessary to effectuate the Commission's goals and cannot workably be applied to limited partners.

The "identity of interest" policy treats "persons with common investments" as though "they were one person" for purposes of affiliation.[6/] This rule makes perfect sense for multiple investors with voting interests in the control group that therefore have the capability of controlling the bidder. Thus, if several investors together control a third concern and also control the bidder, that bidder would have an advantage over a competitor owned by investors that do not have such common investments. In the context of limited partners, however, such common investments are irrelevant because properly insulated limited partners do not have the ability to control either the bidder or their own limited partnership. In these circumstances, the SBA would not apply its own identity-of-interest rules to find an affiliation; the same result is appropriate here.[7/]

[6/] 47 C.F.R. § 720(1)(3) (1994).

[7/] See, e.g., Ochoco Lumber, 1993 SBA LEXIS at *25-*26 (the "general partner has traditionally been considered to control a limited partnership for purposes of assessing affiliation and consequent size status); Size Appeal of Interactive Resources, Inc., SBA No. 3168, 1989 SBA LEXIS 137, *10 ("a general partner in a limited partnership is also

It also would be highly impractical for a bidder to be required to police the common investments of all potential limited partners that may be admitted over time. With each new investor, a general partner would be required to again poll all its existing limited partners to ensure that none of its limited partners have common investments that could potentially be disqualifying. Worse, the investments of all potential limited partners would have to be assessed in light of the interests held by all other investors in other entities holding interests in the designated entity and vice versa. This would present a major obstacle to attracting qualified investors to designated-entity bidders in an extremely competitive market for high-risk capital. Given that the identity-of-interest concept itself is unnecessary to serve the Commission's policy goals, imposing such an onerous continuing obligation of scrutiny is unjustified.

* * *

We share the Commission's commitment to an open and fair licensing process that results in PCS opportunities for entities that are qualified under the Commission's rules. We thus request that the Commission expeditiously clarify its rules so that all designated entities will have access to the same information. We ask only that the rules be interpreted in a manner that is sensible in light of business considerations and consistent with the letter and spirit of the Commission's competitive opportunity program. We believe that these goals are not in tension; workable administration of the Commission's program will, in turn, provide benefits to the individuals and entities that Congress sought to protect.

Respectfully submitted,

Jonathan D. Blake
Kurt A. Wimmer

Attorneys for David Mixer

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presumptively in control of the limited partnership for purposes of the affiliation regulation"); Size Appeal of North West Timber Ass'n, SBA No. 1458, 1981 SBA LEXIS 51, *8.

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